88-178

Supreme Court, U.S.
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CASE NO:_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MATTHEW A. BROZYNA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Third Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the decision below irreconcilably conflicts with the decision of this court in Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and denied the Defendant his constitutional right to a fair trial.

PARTIES TO THE PROCEEDINGS BELOW

Matthew A. Brozyna
Dale Gregg
Edward Gregg
Bruce Gittelman
Phillip D'Agostino
United States of America

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for the Third Circuit

OPINION BELOW

The Opinion of the lower court if reported in United States v. Brozyna 87-1436. The opinion was an unpublished memorandum opinion and is reprinted in full in the appendix to this brief.

JURISDICTION

The Judgment of the Court of Appeals for the Third Circuit was entered on March 25, 1988. On May 12, 1988, the Third Circuit denied the Petitioner's Petition For Rehearing and Rehearing En Banc.

The jurisdiction of the court is invoked pursuant to 28 U.S.C., Section 1254 (1) and Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment to the United States Constitution (due process clause)

STATEMENT OF THE CASE

A. Nature of the Case

Matthew A. Brozyna was a defendant along with five others charged in a multi-count indictment alleging a continuing criminal enterprise and other related controlled substance (marijuana) law violations. (21 U.S.C. Sections 846, 843 (b), 841 (a) (1), 848 and 18 U.S.C. Section 1952). All defendants were found guilty on each count after a two and one half week trial in the Eastern District of Pennsylvania. The defendant was sentenced to thirty years incarceration and fined $100,000.00.

B. Statement of Facts

In 1983 and 1984, Drug Enforcement Administration Special Agents were involved in undercover investigations wherein they posed as smugglers and traffickers in amounts in excess of one

thousand pounds of marijuana.

During the activities of the Special Agents of the "D.E.A.", agents came in contact with one, Dino Diaz, from Miami, in 1983. Diaz was involved in the purchasing, importing and distributing large amounts of marijuana and cocaine, much of it with the assistance and insistence of the government agents.

During the period of 1983 and 1984, Diaz received from the government agents, approximately $87,000.00 in United States Currency. He also received samples of marijuana. The agents of the "D.E.A" negotiated and dealt with Diaz, but did not arrest him, nor did they attempt to gain the return of any part of the $87,000.00 in cash given to Diaz by various agents of the "D.E.A.".

Some time during January of 1984, Diaz introduced Matthew A. Brozyna to the agents while in Texas. No transactions were consummated by the defendant, Matthew A. Brozyna in Texas.

Some time in February 1984, the "D.E.A." agents met with Brozyna and Dino Diaz in Miami, Florida, and negotiated to sell him the seven thousand pounds of marijuana; however, this transaction did not take place with Dino Diaz and/or Matthew A. Brozyna.

On May 1, 1984, the D.E.A. agents met with Brozyna in Philadelphia, Pennsylvania, for the purposes of selling him ten thousand pounds of marijuana, but the defendant, Matthew A. Brozyna, made it clear that he was merely a 'broker' for other persons. Co-defendant Edward Gregg delivered to undercover agents in Miami,

Florida, the sum of $196,480.00. Co-defendant Bruce Gittelman and Arthur Hanmana, delivered $478,936.00 to the agents. The defendants were arrested at this time.

On August 30, 1986, a superseding indictment was returned against the defendant, Matthew A. Brozyna, and other defendants, and consisted of twelve charges. The defendant was found guilty of conspiracy, unlawful use of a communication facility, possession with intent to distribute marijuana exceeding one thousand pounds, continuing criminal enterprise and travel act violations in violation of 21 U.S.C. Sections 846, 843 (b), 841 (a) (1), 848 and 18 U.S.C. Section 1952. The other defendants were all found guilty of various charges. Only the defendant, Matthew A. Brozyna, was

charged and found guilty of a continuing criminal enterprise. Trial was in the United States District Court for the Eastern District of Pennsylvania, from March 4 through March 19, 1986.

A hearing was held on the defendant, Matthew A. Brozyna's Motion For New Trial, based upon newly discovered evidence, on March 7, 1986, the Motion was denied.

On July 15, 1987, the Honorable Judge John Hannum sentenced the defendant on ten counts of an indictment in which he was charged and found guilty of violation of the narcotic laws of the United States with respect to marijuana.

An appeal from this conviction and sentence was pursued by the defendant, resulting in an unpublished opinion which is included in the appendix to this brief.

REASONS FOR GRANTING THE WRIT

I.

The decision below creates an irreconcilable conflict with the opinion of this court in Brady v. Maryland 373 U.S. 83 (1963) and its progeny, and denied the defendant a fair trial.

The thrust of the defense at trial was that an unindicted person, named Dino Diaz, was the true guilty party in the episode involving the six defendants at bar. More specifically, it was contested that the defendant was introduced to the agents and entrapped into acting as a marijuana dealer/broker by Dino Diaz. Despite repeated efforts to learn the whereabouts of Mr. Diaz and defense requests for information in the possession of the government in order to produce Mr. Diaz, he was not found. While the defense does not contend that the act of merely

locating and producing Diaz would have resulted in the proof of an entrapment defense, the facts at bar reveal that legitimate evidence of government payments to Diaz and his involvement in the instant conspiracy would enable the defense to argue an entrapment defense. The fact that the government fails to concede that Diaz was an informant is not dispositive of whether he was, in fact, a government employee and informant.

The seminal case of Brady v. Maryland, 373 U.S. 83 (1963) and its progeny requires the government to produce evidence favorable to the defendant. Clearly, the defense sought very specific information about Dino Diaz, and the government had such evidence in their possession. The Assistant United States Attorney in charge of this case suppressed such information and refused to even allow the trial

court to review the question of whether this information was discoverable to the defense.

It is not the job of the Assistant United States Attorney to be the final judge of what information is helpful to the defense. The specific request of the defendant clearly indicates that at least the defense felt it was important. Certainly the Assistant United States Attorney is not privy to defense strategy meetings and attorney/client communications. Accordingly, when faced with such requests for information, as at bar, if the government wishes to argue that the information is not discoverable, then they should do so by first allerting the trial court that such information does exist and why it should not be revealed. Such was not the case at bar and as such the defendant was denied an

opportunity to present a legally recognized defense of entrapment.

Without the ability to present such a defense, the defendant was denied a fair trial and denied due process of the law.

Certiorari must be granted in order to resolve the conflict between Brady v. Maryland and the opinion below.

CONCLUSION

The case below is a radical departure from the spirit and letter of Brady v. Maryland and its progeny. In order to promote uniformity in the administration of criminal justice, as well as due process of the law; it is urged that this Writ of Certiorari be granted.

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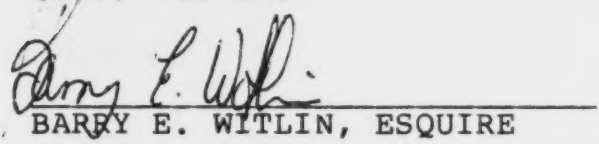

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that all parties required to be served herein have been served and further certify that three copies of the foregoing Petition have been served by United States Mail this 29th day of July, 1988, to the office of the United States Solicitor General, 10th and Constitution Avenue, N.W., Washington, D.C. 20530, and three copies upon Assistant United States Attorney, Judy Goldstein-Smith, 601 Market Street, Philadelphia, PA 19106.

By: Barry E. Witlin
BARRY E. WITLIN, ESQUIRE

APPENDIX A

Opinion of the Lower Court

UNITED STATES OF AMERICA

vs.

BROZYNA, MATTHEW A.

Appellant in No. 87-1436

On Appeal from the United States
District Court For the Eastern
District of Pennsylvania
(Criminal Action Nos. 84-00209-06,
84-00209-07, 84-00209-05, 84-00209-03,
and 84-00209-01)
District Judge: Honorable John B. Hannum

Submitted Under Third Circuit Rule 12(6)
March 14, 1987

BEFORE: STAPLETON, MANSMANN, and HUNTER,
Circuit Judges

MEMORANDUM OPINION OF THE COURT

STAPLETON, Circuit Judge

Each of the five appellants in these appeals was convicted following a two-week trial in the United States District Court for the Eastern District

of Pennsylvania. Their convictions grew out of a reverse sting operation that the Drug Enforcement Administration (DEA) commenced in January, 1984. The operation called for DEA agents to pose as marijuana smugglers and traffickers and to attempt to infiltrate and investigate large buyers of marijuana in the United States.

On January 26, 1984, Dino Diaz, a marijuana broker with whom the DEA had established contact, introduced DEA agents to appellant Brozyna at a hotel in Rosenberg, Texas. Diaz informed the agents that Brozyna was a large quantity buyer of marijuana. Brozyna expressed a desire to purchase 3,000 pounds of marijuana. The agents took Brozyna to a warehouse where they had stored confiscated marijuana. After inspecting

the marijuana, Brozyna agreed to make the purchase. The sale was not consummated, however.

Almost one month later, Brozyna and Diaz met with DEA agents at a hotel in Coral Gables, Florida. Brozyna agreed to purchase 7,000 pounds of marijuana to be delivered to an avocado farm in Miami called the "workhouse", and later to another piece of property called the "stash-house". Brozyna took the agents to view these two properties, and told them that he used the stashhouse to store and the workhouse to sell marijuana. Brozyna also boasted of a network of buyers in New York, Pennsylvania, and Virginia to whom he could distribute large quantities of marijuana. Several days later, the agents decided not to complete the deal.

The deal that the agents finally did complete with Brozyna began on April 19, 1984, when Brozyna met DEA agents and appellant Gittleman and visited a house in New Jersey which Gittleman tendered as a place where a large shipment of marijuana could be delivered and sold. On May 3, 1984, Brozyna and the agents agreed to a delivery of 10,000 pounds of marijuana to Gittleman's house. A truck was filled with the marijuana and driven to the house, but upon arrival the DEA agents refused to unload the truck, ostensibly because there was a police car in the vicinity. The agents then decided not to use Gittleman's house as a delivery point.

The next day, Brozyna and the agents traveled to a small farm and met

appellant D'Agostino, who claimed to be in the business of selling small quantities of exotic marijuana. D'Agostino offered to allow Brozyna and the agents to store 3,000 pounds of marijuana for which Brozyna had not yet secured a buyer. The evidence at trial showed that D'Agostino did not own the farm, but was dating the woman who was renting it. Other than this meeting, the agents had no contact with D'Agostino.

The transaction finally occurred on May 5, 1984. The agents decided to deliver the marijuana to a warehouse they had set up in Bristol, Pennsylvania. After a truck delivered the marijuana, Brozyna arrived and agents began to weigh out the marijuana

for Brozyna's various buyers. Brozyna and the agents then drove to meet appellant Dale Gregg, who returned with them to the warehouse. Dale Gregg cut open the bales assigned to him, approved some, and had some replaced. In general, he was pleased with the quality, and agreed to take 2,000 pounds instead of the 1,500 he had originally bargained for. Dale Gregg then drove with the agents and Brozyna to pay phones from which he called his brother, appellant Edward Gregg, in Miami to arrange for payment to another agent in Miami. Dale gave his brother a code to use when making the payment. After completing the call, Dale told the agents that he would return later to pick up his marijuana. Dale Gregg never returned.

The agents and Brozyna then met Gittleman and another defendant who does not appeal here and took them to the warehouse. After payment was made and their share of the marijuana unloaded, the agents arrested Gittleman and the other defendant, as well as Brozyna. Later that day, Edward Gregg, using the code that Dale had instructed him to use, delivered Dale's payment to a Miami Beach hotel. Edward was later arrested.

I.

During the cross-examination of one of the government's witnesses, DEA agent Lamberson, defense counsel Sharpstein asked about Dale Gregg's failure to return on May 5 to complete his purchase. Lamberson had testified on direct examination that Dale had

probably not returned because he had found out about the arrests. The following exchange occurred:

> Q. Well, isn't there another probability that Mr. Gregg decided he didn't want any part of this deal and just left?
>
> A. That is a question I am sure you would have to ask Mr. Gregg himself. He would be the only one that would know, sir.

Gregg App. at 591a. Defense counsel moved for a mistrial, which the court denied. On Appeal, the Greggs, Brozyna, and Gittleman all argue that Lamberson's statement was an illegal comment on the defendants' rights not to testify.

In United States v. Waller, 607 F.2d 49, 50 (3d Cir. 1979) (per curiam) (citations omitted), this court stated:

> The test for determining whether a remark constitutes an improper comment on an accused's failure to take the stand in his own behalf is "whether the

language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify."

The fact that the statement was made by a prosecution witness rather than by the prosecutor or the court does not make the comment permissible. See United States v. Staller, 616 F.2d 1284, 1291 (5th Cir. 1980).

We do not believe that a jury would naturally or necessarily take Lamberson's comment in the context in which it was made as a comment on the failure of Gregg to testify. The comment came during the government's case when Gregg had not yet been afforded an opportunity to testify and it is highly unlikely that any member of the jury was thinking in terms of his

testifying or not testifying at trial. At that point in the trial, neither Lamberson nor the jury had any way of knowing whether or not Gregg would elect to testify. In context, we are confident that the jury took this comment at face value -- as an acknowledgement that no one really knew what Gregg had in his mind other than Gregg. This was exactly the point that Sharpstein hoped to make by asking the question and we conclude that the defendants have no cause for complaint here.

II.

The Greggs, Brozyna, and Gittleman argue that various aspects of the trial judge's conduct deprived them of a fair trial. "Due process requires that the trial judge conduct and control a trial

so that it is fair and orderly." United States v. Nobel, 696 F.2d 231, 237 (3d Cir. 1982), cert. denied, 462 U.S. 1118 (1983). A trial judge is not prohibited from participating in the conduct of a trial. United States v. Wilensky, 757 F.2d 594, 597 (3d Cir. 1985). However, the judge must not abandon his proper role and assume that of an advocate. Id. In particular, the judge's conduct must not reach the point where it appears clear to the jury that the court believes the accused is guilty. Nobel, 696 F.2d at 237.

First, the appellants complain about the court's having interrupted cross-examination of prosecution witnesses on several occasions with objections not raised by the prosecutor.

Brozyna App. at 318a, 407a-408a, 473a, 707a-708a, 712a-713a. We find no impropriety here. The court's objection did not reflect on the court's attitude toward the guilt or innocence of the defendants and were made in an effort to fulfill the judge's responsibility of managing the trial so that it would move forward expeditiously and fairly. Four out of the five objections were made on the grounds of repetitiveness and the fifth objection was made to allow the witness to finish responding to a question.

Second, the judge at one point during the trial sent the jury out and solicited an objection to testimony from the prosecutor. Gregg App. at 471a; Brozyna App. at 477a. Because this

conduct did not occur within the jury's presence, it could not have any effect on the jury's perception of the judge's impartiality or of the guilt or innocence of the defendants. Thus, this conduct was not reversible error.

Third, the appellants identify several instances in which the court rebuked defense attorneys and required them to bring local counsel with them to court. But in each of the instances identified, the court was responding to the violation by the attorneys of a court procedure that the judge had previously established. For example, the court required the defense attorneys to state their names and the parties they represented when making an objection or motion. Brozyna App. at 112a-116a. In addition, the court

restricted follow-up motions after overruling defense objections. Brozyna App. at 62a, 64a-65a, 471a-472a. The court also required defense counsel to remain seated at the counsel table during cross-examination. Brozyna App. at 257a. Finally, the court required a specific procedure for testimony relating to a prior transcript. Brozyna App. at 275a-280a, 373a-383a, 1028a-1042a.

Each of these procedures was within the discretion of the court to adopt as part of its duty to control the trial proceedings. The court's rebukes often came after repeated violations of these procedures by the defense attorneys; that is, they were not unprovoked. Our comments in United States v. Beaty,

722 F.2d 1090 (3d Cir. 1983) are equally pertinent here:

"The record reveals a judge who was increasingly frustrated by counsel's repeated attempts to do that which he had properly been forbidden to do." 722 F.2d at 1093. "Judges, while expected to possess more than the average amount of self-restraint, are still only human. They do not possess limitless ability, once passion is aroused, to resist provocation." Id. at 1094.

The remaining two instances of alleged court misconduct are more troublesome. After having allowed the prosecutor to thank the court throughout the trial when the court overruled a defense objection or denied a defense motion, the trial judge on one occasion

criticized one of the defense attorneys for thanking the court:

> MRS. GOLDSTEIN-SMITH (Prosecutor): Objection.
>
> MR. SHARPSTEIN (Defense counsel): I haven't finished my question yet, Your Honor.
>
> THE COURT: Let him finish.
>
> MRS GOLDSTEIN-SMITH: Yes, your Honor.
>
> MR. SHARPSTEIN: Thank you, your Honor.
>
> THE COURT: Don't thank me; you just go ahead as you see fit.
>
> MR. SHARPSTEIN: Miss Goldstein-Smith always thanks you.
>
> THE COURT: I invite no thanks, sir.

Gregg App. at 495a. The prosecutor later again thanked the court after the court sustained a prosecution objection, and defense counsel objected. The court responded: "Well, I will make my

comments without any suggestion from you, sir." Gregg App. at 514a.

The other incident occurred a short while later, when in response to a question from defense counsel, DEA agent Weed noted that he had served in the Marines. The following then occurred:

> BY THE COURT:
>
> Q: Where were you in the Marine Corps? I would like to know that.
>
> A: I was in Japan, sir, and the United States.
>
> Q: Yes. When, please?
>
> A: 1955, 1959.
>
> THE COURT: Yes.
>
> MR. SHARPSTEIN: Judge, I would object. This is irrelevant.
>
> THE COURT: No, it isn't either.
>
> MR. GABLE: Your Honor, I also was in the Marine Corps for 8-12 years. Do you want to know where I am from?

MR. ROBBINS: I was in the Marine Corps also, your Honor --

THE COURT: Good.

MR. ROBBINS: --for 4 years.

THE COURT: That is fine.

MR. GABLE: 41 months in Vietnam, three times wounded, your Honor, presently disabled and retired because of those wounds. Does that interest the Court?

THE COURT: I didn't ask for any comment.

Gregg App. at 518a-519a.

If the relevant issues here were whether the trial judge treated counsel evenhandedly and defense counsel with courtesy throughout the trial as required by Canon 3 of the Code of Conduct for United States Judges, we would be constrained to provide a negative answer. The relevant issue, however, is not how defense counsel fared during the trial, but rather

whether appellants received a fair trial on the charges before the court. We think appellants give too little credit to the members of the jury when they equate criticism of defense counsel with criticism of the defendants. While we acknowledge that court criticism of defense counsel can become so persistent and so hostile as to create an unreasonable risk of adverse impact on the jury's judgment regarding the merits of the case, we conclude that the judge's misconduct in these two instances did not approach a level giving rise to concern about the fairness of the merits determination.

Nor do we believe the judge's quickly-quenched curiosity concerning Agent Weed's military career requires reversal. The suggestion that the

message conveyed by this brief interchange was that the judge believed the prosecution and did not believe the defense seems to us strained. We perceive no substantial reason to believe the members of the jury did not do precisely as they were told to do in the charge --make up their own minds based solely upon the evidence.

III.

Gittleman contends that the court committed reversible error in failing to grant defendants' request to preserve the tape recording of the trial proceedings as part of the record. This court in Nobel did state that "[w]here a videotape or sound recording of the trial is in the appellate record, it may be used to support the claim that a defendant was denied a fair trial by the

judge's actions." 696 F.2d at 237. But Nobel does not require a court to make such a tape part of the record in all cases in which judicial misconduct is alleged.

IV.

The Greggs and Gittleman moved to have their trials severed from the trial of the other defendants pursuant to Fed.R.Crim.P. 14. In order to show that the trial court abused its discretion in denying these motions, the appellants have the heavy burden of demonstrating "clear and substantial prejudice resulting in a manifestly unfair trial." United States v. Reicherter, 647 F.2d 397, 400 (2d Cir. 1981).

The Greggs motion was based on the assertion that the evidence against Brozyna, in particular certain tapes

implicating him, prejudiced their case. In such circumstances, this court has held that "[s]everance is not necessary as long as the jurors could judge the case against such defendant only on the basis of the evidence properly adducible against him." United States v. Boscia, 573 F.2d 827, 833 (3d Cir.), cert. denied, 436 U.S. 911 (1978). Moreover,

> in the interest of judicial economy and recognizing the tactical disadvantage to the government from disclosure of its case, the participants in a single conspiracy should ordinarily be tried jointly as long as "the jury can reasonably be expected to compartmentalize the evidence as it relates to the separate defendants" and notwithstanding that the evidence against one codefendant is more damaging than that against another. United States v. De Larosa, 450 F.2d. 1057, 1064-65 (3d Cir. 1971).

United States v. Jackson, 649 F.2d 967, 973 (3d Cir.), cert. denied, 454 U.S. 1034 (1981).

In Boscia, which involved nine defendants in a fraudulent scheme to collect on a car insurance policy, the court concluded that "the scheme...was not so complex nor the actors so numerous that the charges and evidence against each defendant could not be kept separate in the minds of the jurors." 573 F.2d at 833. See also United States; v. De Peri, 778 F.2d 963, 984 (3d Cir. 1985), cert. denied, 106 S.Ct. 1518 (upholding the denial of severance and rejecting the argument that the quantity and manner of taped conversations admitted against other defendants created a danger of "spillover" into the other defendant's

case). The same is true with respect to the case against the Greggs. There was no abuse of discretion.

Gittleman's motion for severance is based on his claim that Brozyna would have testified on his behalf if Gittleman had been tried separately. See generally Dawson, Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices, 77 Mich. L. Rev. 1379, 1438-44 (1979). The necessity of severance in these circumstances depends on four factors: (1) the likelihood of co-defendant's testifying; (2) the degree to which such testimony would be exculpatory; (3) the degree to which the testifying co-defendants could be impeached; (4) judicial economy. Boscia, 573 F.2d at 832. Judicial

economy weighs against severance, as it does in any case. But judicial economy itself is not decisive; the court is to consider this factor only if there is a reasonable assurance that the defendant will be given a fair trial regardless of whether a severance is granted. Id. at 833.

In this case, the trial court did not abuse its discretion in denying Gittleman's motion for a severance. First, there was no specific factual delineation of what exculpatory evidence would have been presented by Brozyna to support a severance. Brozyna's affidavit, which was attached to Gittleman's motion for severance, provided a generalized and vague delineation of the scope of Brozyna's proposed testimony:

> I will testify truthfully to the innocence of the actions of Mr. Gittleman, his attempts to withdraw from the alleged conspiracy, his lack of knowledge of the criminal activity alleged and the compulsion duress and entrapment that caused any otherwise criminal actions to be performed by co-defendant, Bruce Gittleman. I will also testify that Bruce Gittleman did not know and could not have known of the alleged criminal activity alleged herein. I further would corroborate what I believe will be the testimony of Bruce Gittleman, which will be exculpatory in nature.

(App. 39a). This statement does not meet the specificity requirement of the second criteria because it fails to sufficiently demonstrate what exculpatory testimony Brozyna would present on behalf of Gittleman's defense which would necessitate a severance of the co-defendants at trial.

Moreover, the purported exculpatory evidence was readily impeached by the

overwhelming evidence of Brozyna's and Gittleman's participation in the conspiracy and actual possession of the marijuana exceeding 1,000 pounds after Gittleman delivered approximately $48,000 in cash on May 5, 1984, to the undercover warehouse. Gittleman was not entitled to a defense of entrapment as a matter of law because Brozyna had introduced Gittleman to the undercover agents. United States v. Armocida, 515 F.2d 49, 55-56 (3d Cir.), cert. denied, 423 U.S. 858 (1975). Gittleman did not testify at the trial in his own defense. Therefore, the proposed testimony of Brozyna would not "corroborate what I believe will be the testimony of Bruce Gittleman, which will be exculpatory in nature."

Gittleman argues that the court should have conducted a voir dire to examine the details of Brozyna's proposed testimony. In United States v. Rosa, 560 F.2d 149, 156 n.9 (3d Cir.) (in banc), cert denied, 434 U.S. 862 (1977), this court suggested:

> The holding of such a voir dire would be a proper vehicle for the resolution of the severance motion. It would permit the parties and the court to explore, under oath, the likelihood that the co-defendant would indeed, testify at any severed trial. It might also allow some consideration of the projected testimony's content.

But the court did not state that a voir dire would be required in these circumstances. Moreover, in this case, Gittleman made no request for such a voir dire.

V.

Brozyna, Gittleman and D'Agostino all raise issues concerning the admissibility of certain evidence presented at trial. Brozyna and Gittleman claim that allowing the evidence of the unconsummated transactions between Brozyna and the DEA agents in Texas and Florida was reversible error. Brozyna argues that because this evidence was "not mentioned in the indictment," Brozyna Brief at 15 and "not part of the alleged conspiracy," Id. at 17, admitting this evidence "unwittingly put in the minds of the jurors, the false opinion that the defendant was in a continuing criminal conspiracy," Id. But, in fact, the indictment does include Brozyna's acts in Texas and Florida, and alleges an ongoing conspiracy from

January, 1984, until May, 1984. Brozyna Supp. App. at 1a-3a. Thus, these acts were admissible against Brozyna.

Gittleman argues that Brozyna's activities in Texas and Florida were not admissible against him because no evidence linked these activities to Gittleman. Gittleman cites United States v. Castro, 776 F.2d 1118 (3d Cir. 1985), cert. denied, 475 U.S. 1029 (1986), in which this court affirmed the conviction of the defendants on drug conspiracy charges under facts similar to, but nevertheless distinguishable from those in this case.

In Castro, as here, there were several unconsummated transactions between the DEA and the marijuana broker not involving the other defendants and a final consummated transaction. The

Government took the position that all of the broker's activities related to a single conspiracy, but the district court rejected that construction and instructed the jury that they could convict the defendants only on the basis of the consummated transaction. Although the district court allowed testimony concerning the unconsummated transactions, it instructed the jury that this evidence could be considered only against the broker and the one other defendant present at the unconsummated transactions. Gittleman argues that in this case, the evidence of Brozyna's activities in Texas and Florida should likewise not be admissible against him.

Castro is distinguishable from this case, however. In Castro, there

was no evidence that the conspiracy was ongoing; rather, the only evidence of illegal activity was the transactions between the defendants and the DEA agents. In this case, by contrast, the testimony relating to Brozyna's activities in Texas and Florida revealed evidence of an ongoing conspiracy. Brozyna boasted of his large network of buyers in several states. In addition, he showed the DEA agents his workhouse and stash-house and explained how they had been used in the past.

Because the government charged, and the evidence supported, an ongoing conspiracy, Castro is inapplicable, and the testimony concerning Brozyna's activities in Texas and Florida is admissible against all defendants to

establish a background and to show the nature and purpose of the conspiracy. The fact that Gittleman may not have joined the conspiracy until the Pennsylvania transaction is immaterial. See United States v. Janotti, 729 F.2d 213, 221 (3d Cir.), cert. denied, 469 U.S. 880 (1984).

Other courts of appeals have reached similar results. In United States v. Meester, 762 F.2d 867, 876-77 (11th Cir.), cert. denied, 474 U.S. 1024 (1985), the court upheld the admission of testimony involving the drug smuggling activities of one conspirator that preceded the conduct implicating the appellants. The court stated that:

> "the testimony served to establish a background for the later substantive acts charged in the

> indictment and was therefore relevant to prove the existence and purpose of the ongoing conspiracies until after April, 1980. . . . If the appellants knowingly joined an ongoing conspiracy, it is immaterial that they were not aware of every detail of the operation.

Id. at 877. See also United States v. Passarella, 788 F.2d 377, 383 (6th Cir. 1986) ("Although [appellant] was not shown to have specifically participated in these particular criminal activities, our review of the record convinces us that this evidence was relevant to the background and the nature of the conspiracy charged in the indictment.") Thus, the court's admission of testimony concerning Brozyna's activities in Texas and Florida was not error.

D'Agostino contends that the district court erred by admitting

evidence of unrelated and uncharged crimes against him. Over defense counsel's objection, the prosecution was allowed to introduce evidence of D'Agostino's activity as a dealer in small quantities of exotic marijuana. The evidence consisted of D'Agostino's statements to agents Weed and Moger and a sample of exotic marijuana D'Agostino provided to them on the day they met to discuss the possible storage of leftover marijuana at D'Agostino's farm.

D'Agostino argues that the district court abused its discretion in admitting this evidence because it concerned unrelated wrongful acts and was highly prejudicial and so violated Fed. R. Evid. 404 (b) and 403. Rule 404 (b) provides:

> Evidence of other crimes, wrongs or

> acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowlege, identity, or absence of mistake or accident.

Even if the evidence is relevant under 404 (b), it may be excluded under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice. . . or needless presentation of cumulative evidence."

D'Agostino correctly points out that his dealings in exotic marijuana are not part of the indictment, and so evidence concerning these dealings is evidence of "other crimes." Nevertheless, this evidence is admissible under Rule 404 (b). First, it tends to show D'Agostino's willingness in participating in the

conspiracy charged. By revealing his other drug-related activities, D'Agostino was attempting to convince agents that it would be safe to use his farm as a storage facility.

D'Agostino also argues that given all of the other evidence, evidence of his intention to participate was unnecessary. Although it is true that D'Agostino did not contend at trial that he lacked intent, he did contend at trial and does contend on appeal that there was no evidence of motive. According to D'Agostino: "There is no evidence that D'Agostino was to gain anything by storing this marijuana". D'Agostino Reply Brief at 5. But the evidence of D'Agostino's dealings in exotic marijuana provides evidence of a motive. The evidence tends to show that

by advertising his wares and giving a free sample to the agents, D'Agostino was hoping to gain new customers -- either the agents themselves or people referred by the agents. Thus, the evidence tends to show not only willful participation but also that D'Agostino had a motive for offering to store the marijuana for the agents, that is, to help his other drug business.

Because the evidence of D'Agostino's dealings in exotic drugs tended to show D'Agostino's intent and motive to participate in the conspiracy charged, it was admissible under 404 (b). Moreover, we cannot say that its probative value was outweighed by the potential for prejudice.

D'Agostino argues, however, that under this court's decision in United

States v. Lebovitz, 669 F.2d 894, 901 (3d Cir.), cert. denied, 456 U.S. 929 (1982), the trial court is required to engage in an explicit balancing of probative value and unfair prejudice when ruling on the admissibility of evidence of other bad acts. It is true that the court in this case did not make such an explicit balancing. Gregg App. at 220a-234a. But Lebovitz does not require explicit balancing; it merely urges the trial court to do it. If the trial court does not explicitly balance, Lebovitz holds that the appellate court should either find that the trial court implicitly balanced or examined the record itself. We have examined the record and have heretofore stated our conclusion.

VI.

Brozyna and the Greggs maintain that the court erred in denying their motions for a new trial. They claim that although the DEA agents testified that they did not know the whereabouts of Dino Diaz at the time of trial, in fact the government did know his whereabouts and failed to disclose this information to the defense. They claim further that this information would have led to exculpatory evidence: the testimony of Diaz that he was acting as a government agent and informant. In addition, they claim that this information would have allowed them to impeach the credibility of the DEA agents who testified falsely.

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Supreme Court held that

> the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution.

Evidence that would impeach the credibility of a witness is included in this rule if this credibility may be determinative of guilt or innocence. Giglio v. United States, 405 U.S. 150, 154 (1972). Furthermore,

> evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

United States v. Bagley, 473 U.S. 667, 682 (1985).

In this case, the District Court issued an opinion explaining its reasons for denying Brozyna's new trial motion. In this opinion, the court made two significant factual findings. First, the court found that

> While Diaz introduced Brozyna to Government agents, he was neither a Government agent nor a Government witness. There is also no evidence to support Brozyna's claim that the government was protecting and paying Diaz.

Gregg. Supp. App. at 36a. Second, the court found that the government did not have access to Diaz' address while the trial was pending, but did have access to the telephone number of Diaz' father and failed to disclose that number.

Id. at 37a. There is no reason to disturb these findings.

Given these facts, the prosecution did not commit a Brady violation by failing to disclose the phone number. If Diaz was not a government agent or informant, his testimony would not have been material, since no defense of entrapment could have been made out. Moreover, even if Diaz were a government informant, the Greggs do not explain how this information would have helped them, since they were introduced to the DEA agents by Brozyna, not Diaz.

The only way the information could possibly have been "material," then, is if the government had disclosed it after the agents testified that they did not know of Diaz' whereabouts, because then the evidence could have been used to

impeach the credibility of the agents. But there is no evidence that any of the agents who testified at trial actually knew of Diaz' whereabouts. Only Special Agent Bradley, who did not testify at trial, knew the phone number. Moreover, in light of the conclusion that the prosecution did not have to disclose Diaz' whereabouts, there is no reson that the agents should have known this information. Thus, the impeachment value, if any, was very small. In sum, the trial court did not err in denying the motion for a mistrial.

VII.

Brozyna claims that the trial court erred in finding that Brozyna was competent to stand trial. The court held three hearings on this issue at

which expert doctors testified on both sides. In addition to expert evidence that Brozyna was competent, the trial court was entitled to rely on its perception of Brozyna's demeanor at trial in order to determine whether he was competent. See United States v. Renfroe, 825 F.2d 763, 767 (3d Cir. 1987). There is nothing in the record to suggest that the trial court's determination was clearly erroneous.

VIII.

Finally, Edward Gregg, D'Agostino, and Brozyna argue that the evidence was insufficient to sustain their convictions. These claims are frivolous. Edward Gregg claims that he was just a "casual facilitator." But there was ample evidence to show that he was aware of the conspiracy and

intentionally participated in it. D'Agostino claims that he could not store the marijuana as he promised because he did not own the property and because the building could not accommodate so much marijuana. But there was considerable evidence from which the jury could have concluded that he intended and agreed to store it. Brozyna claims that he was never found with money or marijuana and that the government never proved he owned the stash-houses. But Brozyna was able to have money delivered in payment for marijuana and the government presented sufficient evidence of his ownership of the stash-house property.

IX.

For the foregoing reasons, we will affirm the judgments of the district court in all of these appeals.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

_____
Circuit Judge

March 25, 1988.

APPENDIX B

Order Denying Motion for Rehearing And Rehearing En Banc

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 87-1436

UNITED STATES OF AMERICA

vs.

MATTHEW A. BROZYNA,

Appellant

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, Circuit Judges

The Petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this

Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court:

_____
Circuit Judge

Dated: May 12, 1988.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-1426, 86-1453, 86-1506,
87-1325, and 87-1436,

Eastern District of PA Criminal Nos.
84-00209-06/07,05,03,01

UNITED STATES OF AMERICA

vs.

GREGG, EDWARD

Appellant in No. 86-1426

UNITED STATES OF AMERICA

vs.

D'AGOSTINO, PHILLIP,

Appellant in No. 86-1453

UNITED STATES OF AMERICA

vs.

GREGG, DALE

Appellant in No. 86-1506

UNITED STATES OF AMERICA

vs.

GITTLEMAN, BRUCE

Appellant in No. 87-1325

UNITED STATES OF AMERICA

vs.

BROZYNA, MATTHEW A.

Appellant in No. 87-1436

BEFORE: STAPLETON, MANSMANN and HUNTER, Circuit Judges

ORDER AMENDING MEMORANDUM OPINION

IT IS ORDERED that the Memorandum Opinion filed March 25, 1988, in the above case be amended as follows:

The Third sentence of the second full paragraph on page 23 should read: "Only Special Agent Bradley knew the phone number and he did not testify about his knowledge

of that number or of Diaz' whereabouts. Nor did he testify that the other agents knew this information."

BY THE COURT:

_____
Circuit Judge

Dated: May 13, 1988